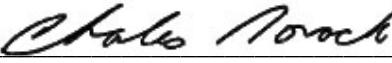


Entered on Docket  
December 09, 2010  
GLORIA L. FRANKLIN, CLERK  
U.S BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA



The following constitutes  
the order of the court. Signed December 08, 2010

  
Charles Novack

U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re:  
CEDAR FUNDING, INC.,  
Debtor(s).

Case No. 08-52709 CN  
Chapter 11

DWIGHT G. LANDON, *individually and as  
Trustee of the Landon Family survivor Trust  
and the Landon Family Exemption Trust LTD  
dated May 6, 1994,*

Adversary No. 10-5308

Plaintiff,

**DECISION**

vs.

MONTEREY COUNTY BANK, ET AL,  
AL.,

Defendants.

On November 17, 2010, this court conducted a continued hearing on plaintiff Dwight G. Landon's motion to remand and defendant Monterey County Bank's motion for relief from the automatic stay. All appearances were made on the record. As stated during that hearing and for the reasons summarized below, the court grants Landon's motion to remand and denies Monterey

1 County Bank's motion for relief from stay.<sup>1</sup>

2

3 This court stated the pertinent facts on the record during the two hearings on these motions.

4 The summary is for ease of reference:

5

6 Debtor Cedar Funding, Inc. commenced the underlying case on May 28, 2008 as a voluntary  
7 Chapter 11 bankruptcy. Cedar Funding, Inc. filed its Chapter 11 case due to the collapse of its Ponzi  
8 scheme, and this court promptly thereafter appointed a Chapter 11 trustee, who remains in place.  
9 Plaintiff Dwight G. Landon, individually and as Trustee of the Landon Family Survivor Trust and  
10 the Landon Family Exemption Trust LTD, dated May 6, 1994 (collectively, "Landon") was an  
11 investor in a note and deed of trust brokered by Cedar Funding.<sup>2</sup> In or about 2001, Cedar Funding  
12 solicited Landon to invest in a fractionalized note and second deed of trust secured by real property  
13 located at 3101 Hermitage Road, Pebble Beach, California (the "Hermitage Property"), which was  
14 then owned by Thomas Harrow. The face amount of the note was \$650,000.00, and Landon alleges  
15 that his \$235,000.00 investment resulted in an undivided 36.154% interest in the note and deed of  
16 trust (the "Fractionalized Landon Note"). The \$650,000 note was secured by a then second deed of  
17 trust against the Hermitage Property. In February 2002, Landon executed a loan servicing  
18 agreement with Cedar Funding, which authorized Cedar Funding to manage and service all aspects  
19 of the Fractionalized Landon Note, including the collection of note payments and the distribution of  
20 these funds to Landon and his fellow investors. The servicing agreement also required Cedar  
21 Funding to consult with and follow the instructions of Landon and his fellow investors on non-  
22 routine collection matters.

23

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24 <sup>1</sup> While Monterey County Bank's motion for relief from stay was filed in the main Chapter  
11 case, the motion for relief from stay and Landon's motion for remand are intertwined.  
25 Accordingly, the court is issuing a consolidated order.

26

27 <sup>2</sup> Landon's investment was solicited by David Nilsen, who at that time was using "Cedar  
Funding" as his dba. He later incorporated Cedar Funding into what is now the Chapter 11 debtor.  
28 For ease of reference, the court will refer to David Nilsen and Cedar Funding as "Cedar Funding."  
All references to the corporate Chapter 11 debtor alone shall be to "Cedar Funding, Inc."

In August 2003, well after the Fractionalized Landon Note had matured, Harrow was unable to pay the balance due and deeded the Hermitage property to Accustom Development, LLC (“Accustom”), an entity purportedly controlled by Cedar Funding. Landon alleges that he did not learn of this transfer until 2008, and states that Cedar Funding hid the transfer by continuing to make the monthly Fractionalized Landon Note payments as part of its Ponzi scheme.

7        Between 2005 and 2007, Accustom, through Cedar Funding solicitations, borrowed  
8 approximately \$2.6 million which it secured with additional, junior deeds of trust against the  
9 Hermitage Property. In December 2007, Accustom borrowed \$1.855 million from Monterey County  
10 Bank (the “Bank”), which purportedly was meant to refinance, *inter alia*, the Fractionalized Landon  
11 Note. Landon claims that he never received any of the refinance proceeds, and he has not  
12 reconveyed his interest in the deed of trust.<sup>3</sup>

14 Accustom allegedly defaulted on the Monterey County Bank \$1.85 million note. The Bank  
15 foreclosed on the Hermitage Property in February 2009, purchased the Hermitage Property at its  
16 trustee's sale, and then sold the Hermitage Property to a third party in May 2010 for \$1.7 million.

On May 16, 2008, eleven days before Cedar Funding, Inc. filed its Chapter 11 case, Landon sued the Bank, Cedar Funding and several other parties in Monterey County Superior Court (Case No. M91029, the “Monterey County Action”) alleging quiet title, breach of fiduciary duty and specific performance causes of action<sup>4</sup>. Landon’s quiet title cause of action alleged that the Bank’s \$1.85 million note and deed of trust is junior to the still unpaid Fractionalized Landon Note and deed of trust. He alternatively asserts that when Accustom took title to the Hermitage Property in August 2003, it took title in trust for Landon and his fellow fractionalized deed of trust holders, and that all

<sup>3</sup> Landon alleges that the title company used in the Bank refinance mishandled the refinance escrow. Those allegations, however, are not relevant to the court's rulings on the motions before it.

<sup>4</sup> The Bank sought relief from the automatic stay to foreclose on the Hermitage Property. It sold the property despite Landon's recordation of a notice of pendency.

1 of the subsequent borrowings secured by the Hermitage Property were unauthorized. Due to the  
2 Chapter 11 filing, Landon amended his complaint in September 2008 to remove Cedar Funding, Inc.  
3 as a defendant. In August 2010, Landon filed a second, amended complaint which added  
4 conversion, interference with contract and constructive trust causes of action against the Bank.  
5 Landon's second amended complaint retained the quiet title, specific performance and breach of  
6 fiduciary duty causes of action. The Bank filed its notice of removal of the Monterey County Action  
7 on September 1, 2010, within 30 days of the filing of Landon's second, amended complaint. The  
8 Monterey County Action was scheduled for an October 4, 2010 trial date.

9  
10 On October 20, 2008, the chapter 11 trustee commenced his own adversary proceeding  
11 against the Bank (Ad. Proc. 08-5299 CN). In his complaint, the Chapter 11 trustee alleges that the  
12 bankruptcy estate also holds a fractionalized interest in the Fractionalized Landon Note. He too,  
13 therefore, seeks to quiet title against the Bank's interest in the Hermitage Property. Notwithstanding  
14 any similarities between the adversary proceeding and the Monterey County Action, the Bank (a)  
15 has not asserted the automatic stay as an affirmative defense in the Monterey County Action, (b) did  
16 not seek to remove the Monterey County Action before its September 1, 2010 notice of removal, and  
17 (c) never sought to dismiss either litigation due to the lack of an indispensable party (purportedly  
18 Landon and the other fractionalized deed of trust holders in the adversary proceeding and the  
19 Chapter 11 trustee in the Monterey County Action).<sup>5</sup>

20  
21 On September 9, 2010, Landon filed his motion to remand, arguing that the Bank did not  
22 timely remove the Monterey County Action. The court grants this motion. The court finds that the  
23 removal of Landon's quiet title, specific performance, and breach of fiduciary duty causes of action  
24 was untimely under Federal Rule of Bankruptcy 9027(a)(2). Rule 9027(a)(2) provides in pertinent  
25 part that "if the ... cause of action in a civil action is pending when a case under the Code is

26  
27 \_\_\_\_\_  
28 <sup>5</sup> The court takes judicial notice of the Report of State Court Proceedings filed by the  
Bank in this adversary proceeding.

1 commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order  
2 for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the ...  
3 cause of action in a civil action has been stayed under section 362 of the Code, or (C) 30 days after a  
4 trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for  
5 relief.”

6

7 Landon first asserted his quiet title, specific performance and breach of fiduciary duty causes  
8 of action in his original complaint, which he filed pre-petition in May 2008. While Landon has  
9 twice amended his complaint, these amended complaints do not alter the fact that the above claims  
10 were “pending” before Cedar Funding, Inc. filed its Chapter 11 case. Moreover, the court takes  
11 judicial notice that no interested party sought relief from the automatic stay to proceed with  
12 Landon’s Monterey County Action causes of action before the Bank filed its notice of removal.  
13 Accordingly, since the Bank filed its notice of removal after the dates prescribed by F.R.B.P.  
14 9027(a)(2)(A) and (C), and since the court has not granted any motion for relief regarding these  
15 causes of action, the Bank’s notice of removal for these causes of action was not timely under  
16 F.R.B.P. 9027(a)(2)(A) and (C) and/or premature under F.R.B.P. 9027(a)(2)(B).

17

18 The court also remands Landon’s conversion, interference with contract and constructive  
19 trust causes of action. While these causes of action were not pending when Cedar Funding, Inc.  
20 filed its Chapter 11, 28 U.S.C. § 1452(b) authorizes the court to remand these claims “on any  
21 equitable ground.” This standard is an “unusually broad grant of authority” that “subsumes and  
22 reaches beyond all of the reasons for remand under non-bankruptcy removal statutes.” In re  
23 McCarthy, 230 B.R. 414, 417 (Bankr. 9<sup>th</sup> Cir. 1999). Equity favors the remand of the entire  
24 Monterey County Action. These causes of action share a common nucleus of facts with the quiet  
25 title, constructive trust and breach of fiduciary duty causes of action. Comity therefore dictates that  
26 they be heard by the same court: the Monterey County Superior Court.

27

28 The court further denies the Bank’s motion for relief from the automatic stay. The Bank

1 filed its motion for relief from stay on August 11, 2010 - before it filed its notice of remand, and  
2 ostensibly in response to Landon's second amended complaint. It is original moving papers, the  
3 Bank argued that it needed relief from stay to allow the Monterey County Action to proceed and to  
4 assert various, unnamed "counterclaims as legally necessary" against the estate of Cedar Funding,  
5 Inc. In response to the court's request for additional briefing on whether the Monterey County  
6 Action violated the stay, the Bank stated that it sought relief to bring slander of title, quiet title,  
7 contribution, fraud, unjust enrichment and conspiracy to breach a contract causes of action against  
8 the Chapter 11 debtor. These causes of action are pre-petition claims. The court takes judicial notice  
9 that the Bank has not filed a proof of claim in the Chapter 11 case, and that the deadline for filing  
10 claims has run. Accordingly, there is no cause to grant relief and expose the bankruptcy estate to  
11 untimely claims against it.

12

13 The court further denies relief from stay to the extent the motion seeks permission to proceed  
14 with the Monterey County Action. The Bank does not have standing to request such relief.  
15 Effectively, the Bank is seeking relief to allow Landon to pursue his claims against the Bank.  
16 Landon (who may be the only party in interest with regard to pursuing these causes of action) has  
17 not requested such relief, and the Chapter 11 trustee has not asserted that such relief is appropriate.  
18 Bankruptcy Code § 362(d) empowers "parties in interest" to seek relief from the automatic stay.  
19 While the Bankruptcy Code does not define this phrase, such standing must be determined on a case  
20 by case basis with reference to the interest asserted and how that interest affects the automatic stay.  
21 Here, the Bank does not have an interest in pursuing Landon's causes of action; indeed, a reasonable  
22 person would believe that it would prefer that these claims not be pursued at all against it. Instead,  
23 this court concludes that the Bank wants relief from stay not due to any relish to litigate these  
24 claims, but to determine the forum in which they will be litigated. See F.R.B.P. 9027(a)(2)(B).

25

26 While it may seem anomalous for this court to decline to determine the applicability of the  
27 stay, the means by which the Bank raises this issue requires an advisory opinion by this court. The  
28 Bank has had more than two years to raise the automatic stay as an affirmative defense in the

1 Monterey County Action. The case law is clear that the Monterey County Superior Court may  
2 determine the applicability of the automatic stay. See *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9<sup>th</sup>  
3 Cir. 2005); *In re Coho Resources*, 345 F.3d 338 (5<sup>th</sup> Cir. 2003). Since the Bank needs to respond to  
4 the second amended complaint, it should, if appropriate, litigate this issue before the Monterey  
5 County Superior Court.

\* \* \* END OF ORDER \* \* \*

UNITED STATES BANKRUPTCY COURT  
For The Northern District Of California

1 Adversary Proceeding Case No. 10-5308

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